

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 04-0088P

**Withholding Tax
For Tax Years 2000-02**

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ISSUE

I. Tax Administration—Negligence Penalty

Authority: 45 IAC 1.1-1-24; 45 IAC 15-11-2

Taxpayer protests imposition of a ten percent (10%) negligence penalty.

STATEMENT OF FACTS

As the result of an audit, the Indiana Department of Revenue ("Department") issued proposed assessments of withholding taxes for 2000, 2001 and 2002. Taxpayer paid amounts equal to the assessments, but protested the imposition of a ten percent negligence penalty. Further facts will be provided as necessary.

I. Tax Administration—Negligence Penalty

DISCUSSION

Taxpayer has various companies within its corporate structure which design, build, supervise and work on powerhouses, plants and other facilities located throughout the United States and the world. Taxpayer hired several contractors to work on a plant construction location in Indiana. Most of these were resident contractors, but a few were not. Taxpayer did not check with the Secretary of State's office to determine if the nonresident contractors were registered to do business in Indiana. In the course of the audit, the Department determined that the nonresident contractors were not registered to do business in Indiana.

The Department issued proposed assessments under 45 IAC 1.1-1-24, which states:

- (a) “Withholding agent” means a person or entity required to withhold gross income taxes under IC 6-2.1-6.
- (b) The term includes a person or entity making payments to a nonresident contractor. The term also includes a prime contractor making payments to nonresident subcontractors. The following contracts are examples of service work that would require withholding on payments to nonresident contractors subject to the gross income tax:
 - (1) A construction contract of any kind.
 - (2) A contract for the performance of or participation in athletic events and exhibitions, including auto races.
 - (3) A contract for entertainment, including single entertainment events.
 - (4) A contract for the furnishing and installation of tangible personal property.
 - (5) A contract for leasing tangible personal property.
- (c) As used in this section, “nonresident contractor” does not include a foreign corporation qualified to do business in Indiana.

In its protest letter, taxpayer states that it reviewed the contracts related to the eight largest nonresident subcontractors at issue. Taxpayer states that, based on the contracts, in some instances the contract was between a third-party general contractor and the subcontractor. Taxpayer states that in those instances the general contractor is responsible for the withholding tax.

Taxpayer states that since it would have to reimburse the general contractor for the additional withholding tax, and in order to avoid its administrative burden as well as the Department’s, it paid the underlying assessments and interest. Also, taxpayer protests the ten percent (10%) negligence penalty on the grounds that the assessments were not the result of taxpayer’s intentional disregard of Indiana law. Taxpayer also states that the amount of the assessments relative to the overall amount of business activity conducted is evidence that it is in general compliance.

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

Also, 45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

Taxpayer's review only included the eight (8) largest nonresident subcontractors out of thirty-three (33) listed. Even then, taxpayer only claims that some of the eight were not its responsibility. Taxpayer has not provided any documentation in support of its protest, let alone sufficient documentation to support its claim that another taxpayer is responsible for some of the withholding taxes. Therefore, taxpayer did not exercise such reasonable care, caution or diligence as would be expected of an ordinary reasonable taxpayer. Under 45 IAC 15-11-2(b), this is negligence, since the definition of negligence is the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Taxpayer's statement that it did not intentionally disregard Indiana's tax law is not relevant.

FINDING

Taxpayer's protest is denied.

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